

ELLIS:LAWHORNE

John J. Pringle, Jr.
Direct dial: 803/343-1270
jpringle@ellislawhorne.com

May 14, 2004

VIA ELECTRONIC MAIL & 1st CLASS MAIL SERVICE

The Honorable Bruce Duke
Executive Director
South Carolina Public Service Commission
Post Office Drawer 11649
Columbia, South Carolina 29211

RE: Petition of Verizon South, Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers And Commercial Mobile Radio Service Providers in South Carolina Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order
Docket No. 2004-0049-C, ELS File No. 812-10237

Dear Mr. Duke:

Enclosed is the original and ten (10) copies of the **Response of KMC Telecom III LLC, KMC Telecom V Inc., NewSouth Communications Corp., XO Communications Inc. and XO Long Distance Services, Inc. ("Competitive Carrier Group") to Verizon's Motion to Hold Proceeding in Abeyance** referenced matter. By copy of this letter, I am serving all parties of record in this proceeding and enclose my certificate of service to that effect.

Please acknowledge your receipt of this document by file-stamping the copy of this letter enclosed, and returning it in the enclosed envelope.

If you have any questions or need additional information, please do not hesitate to contact me.

With kind regards, I am

Very truly yours,



John J. Pringle, Jr.



JJP/cr

cc: all parties of record

Enclosures

F:\APPS\OFFICE\WPWIN\WPDOCS\KMC_NewSouth_Nuvox_Xspedius\Duke.Petition.wpd

**BEFORE THE
PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2004-0049-C**

Petition of Verizon South Inc. for)
Arbitration of an Amendment to Interconnection)
Agreements with Competitive Local Exchange)
Carriers and Commercial Mobile Radio Service)
Providers in South Carolina Pursuant to)
Section 252 of the Communications Act of 1934, as)
Amended, and the Triennial Review Order)

**RESPONSE OF
KMC TELECOM III LLC, KMC TELECOM V INC., NEWSOUTH
COMMUNICATIONS CORP., XO COMMUNICATIONS INC. AND XO LONG
DISTANCE SERVICES INC. ("COMPETITIVE CARRIER GROUP")
TO VERIZON'S MOTION TO HOLD PROCEEDING IN ABEYANCE**

KMC Telecom III LLC, KMC Telecom V Inc., NewSouth Communications Corp., XO Communications Inc. and XO Long Distance Services Inc. ("Competitive Carrier Group" or "CCG" f/k/a "Competitive Carrier Coalition"),¹ by their attorneys, respectfully submit this Response to Verizon South Inc.'s ("Verizon's") May 7, 2004 motion to hold the above-captioned proceeding in abeyance until June 15, 2004.²

I. INTRODUCTION AND SUMMARY

The CCG opposes Verizon's Motion to hold this proceeding in abeyance with regard to those issues that are not affected by the District of Columbia Circuit's decision in *United States Telecom Ass'n v. FCC*, Case No. 00-0012 (D.C. Cir. 2004) ("*USTA II*"). Rather the South Carolina Public Service Commission ("Commission") should move forward and arbitrate those issues raised in the Federal Communications Commission's ("FCC's") Triennial

¹ NOW Communications Inc. is not participating in this Response.

² Verizon South Inc.'s Motion to Hold Proceeding in Abeyance Until June 15, 2004 (filed May 7, 2004)("Verizon Motion").

Review Order³ that are not impacted by the *USTA II* decision. Moreover, the Commission must, without delay, order Verizon to comply with the FCC's current rules with regard to commingling and routine network modifications. Such issues are vital to CLECs' businesses in South Carolina and resolution cannot be delayed, as requested by Verizon.

With regard to those arbitration issues that may be affected by the *USTA II* decision, the CCG does not oppose Verizon's Motion to hold this proceeding in abeyance until June 15, with the express condition that Verizon will maintain the status quo, pending resolution of this proceeding, and will refrain from engaging in any unilateral action to modify the availability, terms and conditions, and/or pricing for Unbundled Network Elements ("UNEs") offered pursuant to existing interconnection agreements. The CCG has already commented that this Commission should address *USTA II* issues in a separate phase of the proceeding, and therefore does not oppose a temporary abatement until June 15.⁴ Nevertheless, it is imperative

³ *Review of the section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17125-26, ¶ 242 (2003), *corrected by Errata*, 18 FCC Rcd 19020 (2003) (collectively "TRO"), *reversed and remanded*, *United States Telecom Ass'n v. FCC*, D.C. Cir. No. 00-1012 (and consolidated cases) (decided March 2, 2004) ("Triennial Review Order").

⁴ As discussed more fully in the Answer of the Competitive Carrier Coalition to Verizon's Petition, when procedurally appropriate, the Commission should assert its authority, pursuant to sections 252 of the Act, as well as state law, to arbitrate the nature and scope of Verizon's ongoing obligation to provide to CLECs access to network elements, as required by the Act and state law. Moreover, to the extent that the Commission may determine that the rates applicable to network elements provided by Verizon under the Act and South Carolina state law differ from those rates currently available to CLECs under section 251(c)(3) of the Act, the Coalition has urged the Commission to immediately establish a "just and reasonable" pricing standard applicable to network elements. *See* Answer of the Competitive Carrier Coalition at 3-6 (filed March 16, 2004). *See also* Response of KMC Telecom III LLC, KMC Telecom V Inc., and NewSouth Communications Corp. to Verizon South Inc.'s Proposed Procedural Schedule (filed Apr. 28, 2004).

for the continued provision of competitive services in South Carolina that Verizon be expressly required to maintain the status quo after June 15 during the pendency of this arbitration.

II. THE COMMISSION SHOULD GO FORWARD ON THOSE ISSUES NOT AFFECTED BY USTA II

The Commission must require that Verizon comply with the existing requirements of the FCC for commingling of UNEs and services and routine network modifications, as clarified by the Triennial Review Order. Neither of these existing obligations require a change of law amendment to implement.

The FCC's clarification of the rates, terms and conditions pursuant to which CLECs may commingle network elements and services did not create any new legal obligation applicable to Verizon. Significantly, the Triennial Review Order states that "a restriction on commingling would constitute an 'unjust and unreasonable practice' under section 201 of the Act" and an "undue and unreasonable prejudice or advantage" under section 202 of Act, and thus would violate the nondiscrimination requirement in section 251(c)(3) of the Act.⁵ Moreover, the Triennial Review Order expressly requires that Verizon immediately effectuate rates, terms and conditions for commingling of network elements and services by modification of its interstate access tariffs.⁶

Likewise, the FCC simply clarified in the Triennial Review Order that ILECs need to continue to perform routine network modifications and specified what is encompassed in that rule.⁷ Therefore, in accordance with the Triennial Review Order, the Commission must

⁵ Triennial Review Order at ¶ 581.

⁶ *Id.* at ¶ 581 and fn. 1791.

⁷ *Id.* at ¶ 632 ("We require incumbent LECs to make routine network modifications to unbundled transmission facilities used by requesting carriers where the requested transmission facilities has already been constructed. By 'routine network modifications' we mean that incumbent LECs must perform those activities that incumbent LECs regularly undertake for their own customers.").

immediately act to ensure compliance by Verizon with the FCC's existing requirements for commingling of UNEs and services and the performance of routine network modifications.

III. THE COMMISSION SHOULD REQUIRE THAT VERIZON MAINTAIN THE STATUS QUO AS A CONDITION TO GRANTING THE MOTION WITH REGARD TO USTA II ISSUES

The CCG does not oppose Verizon's Motion to hold those issues affected by the *USTA II* decision in abeyance until June 15, the date the mandate in *USTA II* is scheduled to issue, assuming no further stay is granted. The CCG does, however, request that the Commission expressly order that Verizon maintain the status quo under its current interconnection agreements after June 15, during the pendency of this arbitration proceeding, as a condition to granting its Motion with regard to those issues affected by *USTA II*.

The members of the CCG are rightfully concerned that Verizon may attempt to take unilateral action to modify the availability, terms and conditions, and/or pricing of UNEs offered pursuant to their interconnection agreements. To say that the parties must abide by their current interconnection agreements is not sufficient. Rather, Verizon must be specifically ordered not to attempt to modify, in any way, UNEs or UNE combinations currently offered under existing interconnection agreements or to increase any rates set forth in those agreements, while the current arbitration docket is underway.

It is the CCG's position that the Commission should evaluate the necessary procedural schedule for addressing any remaining issues at the time *USTA II* goes into effect. If the *USTA II* mandate does, in fact, go into effect on June 15, this Commission should direct the parties to reach a negotiated agreement, with oversight by Commission Staff as appropriate, over a subsequent 135-day period. To the extent the parties cannot reach a negotiated agreement, the parties should submit to this Commission a jointly-developed issues list at the end of that period,

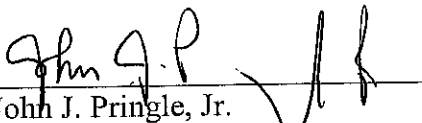
which would trigger another phase of the arbitration proceeding to address those issues impacted by the *USTA II* mandate.

Despite the procedural process necessary to resolve any *USTA II* issues, the Commission must expressly require Verizon to maintain the status quo on and after June 15, during the pendency of this arbitration proceeding, in order to protect the contract rights of South Carolina CLECs from potential unilateral actions by Verizon.

IV. CONCLUSION

Consistent with the foregoing, the Commission should move forward with this proceeding and deny Verizon's Motion to hold the proceeding in abeyance until June 15, with regard to those issues not affected by the *USTA II* decision. With regard to those issues that are impacted by the *USTA II* decision, the Commission should expressly require that Verizon maintain the status quo after June 15, pending resolution of this proceeding, and refrain from engaging in any unilateral action to modify the availability, terms and conditions, and/or pricing for UNEs offered pursuant to existing interconnection agreements.

Respectfully submitted,



John J. Pringle, Jr.
ELLIS, LAWHORNE & SIMS, P.A.
1501 Main Street, Fifth Floor, P.O. Box 2285
Columbia, SC 29202
Tel. 803-343-1270
Fax 803-799-8479
jpringle@ellislawhorne.com

Genevieve Morelli
Heather T. Hendrickson
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, NW, Suite 500
Washington, DC 20036
(202) 955-9600 (telephone)
(202) 955-9792 (facsimile)

*Counsel to KMC Telecom III LLC, KMC Telecom V
Inc., NewSouth Communications Corp., XO
Communications Inc. and XO Long Distance
Services Inc.*

Dated: May 14, 2004

**BEFORE THE
PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2004-0049-C**

Petition of Verizon South Inc. for)	
Arbitration of an Amendment to Interconnection)	
Agreements with Competitive Local Exchange)	
Carriers and Commercial Mobile Radio Service)	CERTIFICATE OF SERVICE
Providers in South Carolina Pursuant to)	
Section 252 of the Communications Act of 1934, as)	
Amended, and the Triennial Review Order)	

This is to certify that I have caused to be served this day, one (1) copy of the **Response of KMC Telecom III LLC, KMC Telecom V Inc., NewSouth Communications Corp., XO Communications Inc. and XO Long Distance Services, Inc. ("Competitive Carrier Group") to Verizon's Motion to Hold Proceeding in Abeyance** placing a copy of same in the care and custody of the United States Postal Service, with proper first-class postage affixed hereto, and by electronic mail service, and addressed as follows:

Steven W. Hamm, Esq.
Richardson Plowden Carpenter & Robinson PA
PO Drawer 7788
Columbia SC 29202

Richard Chapkis, Esquire
Vice President and General Counsel
Verizon South, Inc.
Verizon Legal Department
Southeast Region
201 N. Franklin Street – FLTC0717
Tampa FL 33601

M. John Bowen, Jr., Esquire
McNair Law Firm, PA
PO Box 11390
Columbia SC 29211

Robert E. Tyson, Jr., Esquire
Sowell Gray Stepp & Laffitte, LLC
PO Box 11449
Columbia SC 29211

Faye A. Flowers, Esquire
Parker, Poe, Adams & Bernstein LLP
PO Box 1509
Columbia SC 29202-1509

Terry J. Romine, Esquire
US LEC Corp.
Deputy General Counsel – Regulatory
Morrocroft Center III
6801 Morrison Blvd.
Charlotte NC 28211

F. David Butler, Esquire
South Carolina
Public Service Commission
PO Drawer 11649
Columbia, SC 29211



Carol Roof

May 14, 2004
Columbia, South Carolina
B:\APPS\OFFICE\WPWIN\WPDOCS\KMC_NewSouth_Nuvox_Xspedius\cert.service.wpd